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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054069
Party	Plaintiff Marc Hogue
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Attachments	Hogue v SkyDive Arizona Petitioner's Response to Request to Take Judicial Notice.pdf (3 pages)(1557420 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark Registration No. 3,099,847 (Application Serial No. 76/641,146)

MARC HOGUE, Petitioner, SKYDIVE ARIZONA, INC., Respondent.	Cancellation No. 92/054,069

RESPONSE TO REQUEST TO TAKE JUDICIAL NOTICE

Marc Hogue ("Petitioner"), through his attorneys, respectfully responds to Respondent's Request to Take Judicial Notice ("Request"). [Doc. 7]. Petitioner does not object to the Board taking judicial notice of Exhibits A through C attached to Respondent's Motion to Dismiss for purposes of the Motion to Dismiss. Specifically, the Board may take judicial notice of the fact that said documents were filed as part of the court record in Skydive Arizona, Inc. v. Mike Mullins d/b/a Arizona Skydiving, Civ. No. CIV 01-1854 PHX SMM in the United States District Court for the District of Arizona.[1] Petitioner further does not object to the Board's consideration of Exhibit D in the context of Respondent's Motion to Dismiss only, although Petitioner asserts that Respondent has failed to establish that judicial notice is appropriate.

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[1] Petitioner notes, however, that taking judicial notice of the court records does not equate to accepting the statements, conclusions, etc., in those records as fact. As the Ninth Circuit has recognized:

> On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so "*not for the truth of the facts recited therein*, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."

Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001) (*quoting Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426-27 (3rd Cir. 1999)) (emphasis added).

Petitioner does, however, object to the Board taking judicial notice of the two deposition transcripts attached to Respondent's Motion to Dismiss as Exhibit E and F. Although Respondent states in a conclusory manner that the transcripts are "court records," Respondent has not provided the Board with any information from which the Board could draw that conclusion.

Pursuant to Federal Rule of Evidence 201(b) and T.B.M.P § 704.12(a), the Board can take judicial notice of any fact not subject to reasonable dispute and that "is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." It can hardly be said, and Respondent has not argued, that Exhibits E and F are "generally known within the territorial jurisdiction of the trial court." Thus, judicial notice under F.R.E. 201(b)(1) is inappropriate under the first prong of the test.

Further, an examination of the docket in Civil Action No. CIV 01-1854 PHX SMM does not reveal that either transcript is a part of the court record. It may be that the deposition transcripts were attached to some document that is part of the court record, but Respondent has failed to provide information that would allow the Board to reach that conclusion. In other words, Respondent has provided no information establishing that the existence of the transcripts in the court record are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In the absence of such information judicial notice under F.R.E. 201(b)(2) is also inappropriate. Having failed to satisfy the requirements of judicial notice, Respondent's request as to Exhibits E and F should be denied.

Petitioner notes that Respondent, rather than actually address the elements required to obtain judicial notice, devotes numerous pages arguing the relevance and meaning of the

underlying exhibits. An examination of Federal Rule of Evidence 201 and T.B.M.P. § 704.12 reveals, however, that relevance is neither a prerequisite for, nor a sufficient ground for, judicial notice. A court may take judicial notice of an irrelevant fact, and a mere showing of relevance is not in itself grounds to take judicial notice of disputed facts. *See, e.g., Total Petroleum Puerto Rico Corp. v. Torres-Caraballo*, 672 F.Supp.2d 252, 254-55 (D. Puerto Rico 2009).

To be clear, Petitioner disputes the arguments and conclusions advanced in Respondent's Request for the reasons set forth in his Response to Respondent's Motion to Dismiss filed contemporaneously herewith, and incorporates that Response herein by reference.

August 16, 2011

Respectfully submitted,

By: _____

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Certificate of Service

The undersigned certifies that a copy of this Response to Respondent's Request to Take Judicial Notice was sent by certified first class mail to: Sid Leach, Esq., SNELL & WILMER, One Arizona Center, 400 E. Van Buren Street, Suite 1900, Phoenix, AZ 85004.

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Jimmie W. Pursell